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In the Supreme Court of the United States

ANTONIO ARIAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At his criminal trial, petitioner subpoenaed an FBI informant to testify about matters which occurred solely in connection with the informant's work for the FBI. The informant's testimony was critical because it would have corroborated petitioner's defense of third-party culpability, and would have undermined the credibility of the only government witness testifying against him. The informant, through counsel, asserted his privilege against self-incrimination, and the trial court sustained the informant's assertion of the privilege without conducting a proper inquiry into its validity. The court of appeals below countenanced the district court's erroneous exclusion of the informant's testimony on the ground that, even if constitutionally erroneous, the district court's error in excluding the informant's testimony was harmless beyond a reasonable doubt.

The question presented is:

Did the court of appeals err in concluding that the constitutional error committed by the district court was harmless beyond a reasonable doubt?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Antonio Arias, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported. App.1a. The ruling of the United States District Court for the District of Connecticut is unreported. App.8a.

JURISDICTION

The Second Circuit filed its opinion on January 7, 2011. The Second Circuit possessed jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution guarantees, *inter alia*, that "[n]o person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of * * * liberty * * * without due process of law * * * *"

The Sixth Amendment of the United States Constitution guarantees, *inter alia*, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Introduction

A government informant who has been subpoenaed by the defense to provide exculpatory testimony at the trial of an accused may avoid the requirement of testifying by asserting the Fifth Amendment privilege against self-incrimination provided he can show that, in giving such testimony, he would be "confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980). Since it is well settled that a government informant cannot be criminally prosecuted "for conduct engaged in during the course of that agency," *United States v. Zappola*, 646 F.2d 48, 53 (2d Cir.) *cert. denied*, 495 U.S. 866 (1982); (citing *United States v. Eisenberg*, 596 F.2d 522, 527 (2d Cir.), *cert. denied* 444 U.S. 843 (1979); *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977), an informant who is subpoenaed to testify as a witness at trial "cannot reasonably fear prosecution [based upon his responses to questions directly relating to] his activities as a government [informant]. Thus, [if subpoenaed to testify, the informant] cannot legitimately invoke the privilege against self-incrimination as to questions of limited scope dealing solely with those activities." *Id.*

"Ultimately, it is for the trial judge to determine whether 'a responsive answer to the question (posed) or an explanation of why it cannot be answered

might be dangerous because injurious disclosure could result.'" *Id.* (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)). In making such determination, a "blanket refusal" on the part of the informant to testify is clearly unacceptable. *United States v. Melchor-Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). Rather, because a criminal defendant has a constitutionally-protected "right to offer testimony of witnesses, and compel their attendance, if necessary * * * *" *Washington v. Texas*, 388 U.S. 14, 19 (1967), before permitting a duly subpoenaed witness to sidestep testifying for the defense based upon the witness's decision to assert the privilege against self-incrimination, a trial judge is duty-bound to closely scrutinize the basis for the informant's assertion of the privilege by making a "particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not [the informant's assertion of] the privilege is well founded." *United States v. Melchor-Moreno*, 536 F.2d at 1049; *See also, United States v. Gibbs*, 182 F.3d 408, 431 (6th Cir. 1999) (witness cannot make blanket assertion of Fifth Amendment privilege, but rather must take stand and assert privilege in response to questions); *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991) (court must review assertions of privilege on question by question basis to provide presiding judge specific information needed to determine applicability of Fifth Amendment privilege).

This case presents the question of the extent to which the harmless error standard would apply when it has been assumed by the court of appeals that a trial court has committed constitutional error by permitting an FBI informant subpoenaed as a

crucial defense witness to avoid giving testimony expected to exculpate the accused based solely upon the informant's blanket assertion of the privilege, and without the trial judge ever making the required "particularized inquiry" into the validity of that blanket assertion.

B. Facts

a. Summary of Proceedings

On December 13, 2007, a federal grand jury in the District of Connecticut returned an indictment against four individuals, including the defendant, Antonio Arias, charging the defendant with one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(ii), and one count of attempt to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(A)(ii) and 18 U.S.C. § 2.

The defendant was tried on the indictment twice. The first trial, which occurred between May 19 and May 27, 2009, ended in a mistrial due to a deadlocked jury. The second trial began on June 22, 2009 and concluded on June 26, 2009 when the jury returned a verdict of guilty against the defendant on counts one and two of the indictment. On November 6, 2009, the district court sentenced the defendant to 360 months of imprisonment and 10 years of supervised release on each count, to be served concurrently. He is presently in custody serving the sentence imposed by the district court.

b. The FBI Informant

During the spring or early summer of 2007, the FBI in New York acquired the services of a confidential informant named Hugo Figueroa. Figueroa was an individual who was in a position to report on the activities of a cocaine conspiracy which, up until that time, had allegedly been responsible for successfully importing into the United States, on an ongoing basis, multi-kilogram quantities of cocaine secreted in palletized boxes of bananas located within large fruit shipments from Colombia.

According to Figueroa, the linchpin of the conspiracy was an individual subsequently determined by the FBI to be William Mascari. Mascari was the principal in a fruit and produce importing company located in New Haven, Connecticut known as Mascari Brothers. Mascari Brothers was the owner and importer of the banana shipments containing the hidden cocaine.

Also involved in the conspiracy, according to the informant, were individuals who either knew, or worked closely with, Mascari, including, inter alia, William Pacheco, a/k/a "Tito", Ottavio Mejia, a/k/a "Tava", a "Colombian connection," and, most significantly, a person specifically identified by Figueroa to be the Dominican connection to the Colombian suppliers--an individual named Alex Arias.[1] At no time did Figueroa ever identify defendant Antonio Arias as a member of the conspiracy.

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[1] Alex Arias is one of several brothers of the defendant, Antonio Arias. It was undisputed at trial that William Mascari knew Alex Arias personally.

c. The Cocaine Seizure

In late July of 2007, the informant reported to the FBI that he had learned, through Alex Arias, who was, at the time, in hiding in the Dominican Republic,[2] that 600 kilograms of cocaine--subsequently modified to 444 kilograms--was about to arrive in the United States at the Turbana terminal at the harbor in Bridgeport, Connecticut on the cargo ship Napier Star secreted in a shipment of "Five-a-Day" brand bananas[3] ultimately destined for delivery to Mascari Brothers.

On July 30 and 31, 2007, acting upon the information which had been provided by Figueroa, a team of federal agents from the FBI, US Immigration and Customs Enforcement, and local agencies searched the Napier Star as it lay at anchor in the harbor at Bridgeport, Connecticut. However, despite a two-day search of 4800 banana pallets on the ship, no hidden cocaine was discovered, and the cargo of the Napier Star was released.

Following the search, on July 31, 2007, the portion of the ship's released banana cargo belonging to Mascari Brothers was picked up and transported by Mascari from the docks in Bridgeport to Mascari's warehouse in New Haven. Thereafter, over the next

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2 According to the informant, Alex had recently fled to the Dominican Republic after a large, 20 kilogram, seizure of cocaine had been effected by law enforcement officials at Alex's residence in Washington Heights, N.Y.

3 It was undisputed at trial that, for almost the entire year before, from April 2006 to December 2006, Mascari Brothers had regularly sold "Five-a-Day" brand bananas to Alex Arias.

several days, William Mascari, Raymond Pacheco and Jesus Arias[4] searched for the hidden cocaine among the banana pallets stored in the Mascari warehouse and, on the evening of August 6, 2007, the three successfully located the pallet containing the cocaine.

At around 1:00 a.m. on August 7, 2007, the morning after the cocaine was located, Mascari loaded numerous banana pallets, including the drug-laden pallet, into a truck and headed for the Bronx. He pulled out of the warehouse and entered the southbound ramp of Interstate 95, heading for New York. As he did so, FBI agents who had been monitoring the Mascari warehouse based upon information from their informant that the pallet containing the narcotics had finally been located, initiated moving surveillance of Mascari's truck. Sensing that he was being followed, Mascari returned to the warehouse, unloaded only the pallet containing the drugs, and then proceeded on to New York. However, as he traveled along Interstate 95 on his way to New York, Connecticut State Troopers, acting at the direction of the FBI, stopped Mascari's truck as it reached the Stamford, Connecticut truck-stop on the highway. Thereupon, Mascari's truck was searched with his consent but, having removed the pallet earlier from his truck when he had returned to his warehouse, no cocaine was found by the troopers and Mascari was eventually released.

Later that day, after his release, and upon returning to his warehouse, Mascari learned that an unwitting Mascari employee had, just a few hours

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[4] Jesus Arias is also a brother of the defendant.

earlier, during Mascari's detention at the Stamford truck-stop, mistakenly sent the pallet of bananas which contained the hidden cocaine to a Mascari customer, Junior's Produce, located in Hunt's Point Market in the Bronx. Thereupon, Mascari immediately conveyed this information to co-conspirators who, obviously unaware of Hugo Figueroa's status as an FBI informant, enlisted Figueroa's assistance in retrieving the drug-laden banana pallet from Junior's Produce. That evening, after the bananas and the drugs had been loaded onto a truck for transport from the Hunt's Point Market, and based, once again, on the first-hand information and active assistance which was being provided to the FBI by Figueroa on an ongoing basis, the FBI was able to stop the truck as it departed Hunt's Point and search it. When the agents opened the truck and searched with the consent of its driver, they could clearly see the wrapped bricks of cocaine through air holes in the banana boxes. The banana boxes were found to contain a total of 444 kilogram bricks of cocaine.

On August 13, 2007, FBI agents approached William Mascari in the driveway of his residence and confronted him with incriminating details of the drug seizure. After consulting with an attorney, Mascari agreed to cooperate with the government. While cooperating, Mascari was debriefed at length by the FBI on numerous occasions about his involvement in the conspiracy. Significantly, during those debriefings, while alleging in great detail the involvement of Antonio Arias in the cocaine conspiracy, Mascari, unlike Figueroa, never once said anything which in any way implicated Alex

Arias in the conspiracy and, accordingly, Alex was never named as a defendant in the indictment.

d. Post-Indictment Proceedings in the District Court

As indicated, there were two trials in this case. The first trial concluded with entry of an order by the trial court declaring a mistrial after the jury had informed the court that it was hopelessly deadlocked on the issue of Antonio Arias's guilt or innocence. Thereafter, the court scheduled re-trial to begin on June 22, 2009. On June 12, 2009, in order to establish, as its basis for a "third-party culpability" defense, Alex Arias's direct role as Mascari's partner in the cocaine conspiracy, and in order to attack the credibility of anticipated trial testimony from William Mascari, the defense subpoenaed Hugo Figueroa, the FBI's informant, to testify as a defense witness at the defendant's upcoming re-trial. At the same time, having been telephonically informed by the informant's lawyer that, upon counsel's advice, it was the informant's intention to assert his Fifth Amendment privilege against self-incrimination if called by the defense as a trial witness, the defense filed a motion seeking (1) an order of the court compelling the testimony of the informant, and (2) an evidentiary hearing at which the defense would be permitted to question the informant in order to establish that he could not properly hide behind the privilege against self-incrimination as a means of avoiding the defense subpoena.

The motion filed by defendant Arias contained, as an offer of proof, a detailed recitation of facts culled from five separate FBI reports containing an

extensive amount of data describing the activities in which the informant had engaged not prior to becoming an informant, but solely while acting as an informant under FBI supervision for the period of time leading up to and including the FBI's seizure of the 444 kilogram cocaine shipment on August 7, 2007. It was abundantly clear, based upon a reading of the FBI reports, that Hugo Figueroa was an individual who, under FBI supervision, had been extremely successful in penetrating the cocaine conspiracy in this case and, while working as an informant, had managed, under FBI supervision, and with FBI assistance, to become such a trusted member of that conspiracy that he had been freely provided first-hand information by individuals who were at the highest levels of the conspiracy; particularly, the individual alleged by the defense to be Mascari's partner in the scheme--Alex Arias.

Furthermore, the significant degree of trust placed in Hugo Figueroa by the conspirators had enabled him, with FBI assistance, to personally orchestrate the 444-kilogram cocaine seizure by the FBI at the Hunt's Point Market on August 7, 2007. The defense motion to compel was submitted with a supporting memorandum of law and had annexed to it the specific FBI reports which had been referenced and relied upon in the body of the defense motion, as well as an in-depth statement describing the proposed scope of Figueroa's testimony, reasons why the testimony was so important and the legal basis for the requested hearing.

On June 23, 2009, in a brief oral ruling delivered from the bench, followed three days later by a written ruling of June 26, 2009, without conducting any inquiry whatsoever into the validity of the

informant's assertion of the privilege, the trial judge denied the defendant's motion to compel based solely upon (1) the informant's lawyer's bare assertion that, if called to the witness stand, Figueroa intended to make a blanket assertion of the privilege; and (2) the court's arbitrary and highly speculative conclusion that it would not be possible for Arias to ask any questions of Figueroa that did not require Figueroa, in providing responses, to "delve" into matters *pre-dating* his FBI cooperation (App. 7a-10a). In denying the defense motion to compel without scrutinizing the informant's assertion of the privilege, the trial judge denied the defense all meaningful opportunity to offer evidence establishing (a) that Antonio Arias had not been involved in the conspiracy; and (b) that Mascari's testimony lacked credibility.

e. The Government's Case and Petitioner's Defense

While numerous witnesses testified for the government at the defendant's trial, William Mascari was the one and only witness whose testimony implicated Antonio Arias in the illicit narcotics scheme. As aptly summarized by the Second Circuit, Mascari testified that "he had met Antonio Arias, agreed to Arias's plan to import cocaine in pallets of bananas and then imported hundreds of kilograms of cocaine which Arias received." (App.7a). The defendant's defense, however, was that Mascari's trial testimony had not been truthful and that all of the unlawful and illicit conduct which Mascari had attributed to Antonio was, in fact, actually attributable to Antonio's brother, Alex. (App. 3a). Based solely upon the word of William Mascari,

Antonio Arias was convicted of all charges by the jury.

f. Petitioner's Direct Appeal

Antonio Arias appealed his convictions to the United States Court of Appeals for the Second Circuit. On appeal, he argued, *inter alia*, that by failing to properly scrutinize the FBI informant's blanket assertion of the privilege, despite repeated assurances by the defense that it would limit the scope of its questioning of Figueroa directly to matters and events relating solely to his work for the FBI on this case, the district judge had arbitrarily deprived the defense of access to a crucial defense witness and, thus, his due process right to present a complete defense. In affirming Arias's convictions, the Second Circuit did not find that the trial judge had *not* committed constitutional error in permitting the informant to avoid testifying as a defense witness based solely upon what amounted to a blanket assertion of his privilege against self-incrimination. Rather, it concluded that:

> On the facts of this case, we find that if the district court erred, the error was harmless.

(emphasis added). Citing *Chapman v. California*, 386 U.S. 18 (1967) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the appeals court held that:

> A reviewing court may disregard constitutional error if it is "able to declare a belief that [the error] was harmless beyond a reasonable doubt * * * In this case, [William Mascari] testified that he had met Antonio Arias, agreed to import cocaine

> in pallets of bananas, and then imported hundreds of kilograms of cocaine, which Antonio Arias received. Further, at trial, Arias questioned an FBI Special Agent who dealt with [Hugo Figueroa], and the Special Agent testified that [Figueroa] never mentioned Antonio Arias. Because the Special Agent's testimony substantially overlapped with the questions Arias wanted to ask [Figueroa], and the jury actually rested its verdict on the first-hand testimony of [William Mascari,] the cocaine importer, "the guilty verdict actually rendered in his trial was surely unattributable to the [alleged] error * * * *

(App. 7a-8a). This petition seeks review of the Second Circuit's application of the harmless error standard to the constitutional error assumed, but not expressly held by the court of appeals, to have occurred in this case.

REASONS FOR GRANTING THE PETITION

The Second Circuit Has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of this Court.

The Second Circuit was wrong in its contention that it could "disregard [the district judge's] constitutional error" because it was able to "declare a belief" that the constitutional error in precluding the defense from offering relevant, non-privileged, exculpatory testimony was harmless beyond a reasonable doubt. Its "belief" in the harmlessness of the trial court's error was grounded upon the

erroneous premise that mere testimony from an FBI agent, which had been elicited at trial by the defense on cross-examination, that the FBI informant never "mentioned Arias" during the time the informant worked for the FBI somehow sufficed as an adequate substitute for direct testimony from the informant himself exculpating Antonio Arias from involvement in the conspiracy because the agent's testimony "substantially overlapped" with the testimony the defense wanted to elicit from the informant. The agent's "overlapping testimony," the appeals court reasoned, considered together with Mascari's "first-hand" testimony about his alleged dealings with Antonio Arias, had satisfied the court that the jury's guilty verdict was unattributable to any error alleged by the defense to have been committed by the trial judge in excluding the informant's testimony. But the defense in this case sought to establish through the informant a great deal more than what the jury had heard from the agent, and there is absolutely no question that the informant's excluded testimony would have directly exculpated the defendant and, thus, would have been far more helpful to the defense than what had been elicited by the defense from the agent.

This Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the United States Constitution guarantees every criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his

own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also*, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (Defendant "has the right to present his own witnesses to establish a defense."); *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (same).

This right to call defense witnesses is central to two basic premises of our system of criminal justice: first, that the prosecution's case must "survive the crucible of meaningful adversarial testing," *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)); and second, that within this crucible, the jury-not the judge-serves as "the lie detector" assessing the relevant, competent evidence. *United States v. Scheffer*, 523 U.S. 303, 313 (1998). As this Court summarized in *Washington v. Texas*, "[t]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. 388 U.S. at 22.

Applying these principles, this Court has invalidated numerous evidentiary bars to the admission of defense witness testimony. See e.g., *Crane v. Kentucky*, 476 U.S. at 691 (overturning bar on introduction of evidence regarding the circumstances of a confession); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (overturning bar to admission of hypnotically refreshed testimony); *Washington v. Texas*, 388 U.S. at 22 (overturning bar on testimony by accomplices or accessories). Indeed, in cases in which the defendants' defense was identical to that asserted by the defendant in this case, this Court declared unconstitutional the application of certain state evidentiary rules that barred a defendant from

introducing evidence of third-party guilt, specifically the testimony of witnesses that another party had confessed to or committed the crime. *See*, *Chambers v. Mississippi*, 410 U.S. at 302 (combination of "voucher" and hearsay rules precluded introduction of third-party confessions as well as effective cross-examination of witness who repudiated prior confession and offered an alibi); *Holmes v. South Carolina*, 547 U.S. 319; 323-24 (2006) (Third-party guilt evidence excluded based upon state evidentiary rule precluding admission of such evidence when the state offers reliable forensic evidence which incriminates defendant).

In all these cases, the Court recognized that courts have considerable latitude in fashioning and applying evidentiary rulings "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (quoting *Chambers*, 410 U.S. at 302). But this Court has never countenanced a trial court's arbitrary exclusion of "competent, reliable evidence" from percipient witnesses, whether they be reluctant to testify or not, who are in a position to provide probative testimony bearing on a defendant's innocence. To the contrary, the Court has struck down arbitrary rulings limiting such testimony. In so doing, the Court has sought to preserve the accused's right to present a defense and to protect the jury's role as the finder of fact and arbiter of witness credibility in criminal cases. *Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 23.

A. The Defense Was Deprived of Offering Far More in Terms of Exculpatory Evidence Through the Informant Than What was Perceived by the Second Circuit

By including, in support of its offer of proof to the trial court, numerous FBI reports identifying several specific areas relating to the informant's work about which the defense sought to question that informant, the defense at all times had made it abundantly clear that it intended to offer through the testimony of the informant much more in terms of exculpatory evidence than the mere fact that, while working as an informant, "Figueroa had never mentioned Antonio Arias" to the FBI. For example, it was undisputed in this case that the informant had personally orchestrated the FBI seizure of the 444 kilogram cocaine shipment which lies at the heart of the government's case, and, therefore, it would have been entirely reasonable for the jury to infer, from both the content of those FBI reports describing Figueroa's ongoing work for the FBI, and Figueroa's ultimate success in orchestrating the 444 kilogram cocaine seizure at Hunt's Point, that the informant had been so successful in his work for the FBI because he had acquired access to high ranking members of the conspiracy. Clearly, given the fair inference that Figueroa knew so much about the conspiracy and its members, the defendant had a fundamental right to physically stand before the informant in open court, in the jury's presence, to confront him, face to face, and to have defense counsel directly ask the informant whether, at any time during the course of assisting the FBI, the informant had ever even once set eyes on the

individual standing before him. *See*, *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("We have never doubted...that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). Once the jury fully understood just how deeply Figueroa had penetrated the conspiracy while working for the FBI, the impact that such in-court confrontation might have had upon the jury in assessing both Mascari's credibility, and the strength of the defendant's third-party culpability defense in this case, is simply incalculable and, accordingly, the error in not providing such opportunity to the defendant cannot fairly be considered "harmless."

As a second example of what the defense had been prevented from establishing through the informant's testimony, the defendant's entire defense in this case, as recognized by the Second Circuit, was that of third-party culpability—i.e., that, contrary to Mascari's trial testimony, Mascari's true partner in the illicit cocaine venture was the defendant's brother, Alex Arias, and that, accordingly, Mascari's trial testimony identifying Antonio as his partner in the scheme was not credible. (App.3a). In it's ruling, the Second Circuit observed that, in one of the FBI reports attached to the defendant's motion to compel, Figueroa reported to the FBI the details of a direct contact he had had with Alex Arias in late July of 2007. This contact occurred only a short time before arrival of the illicit banana shipment containing the 444 kilograms of cocaine. According to the informant, during this contact, Alex advised the informant of the exact quantity of cocaine (originally 600 kilograms later modified to 444) which was about to arrive on the Napier Star. (App.3a). Testimony from

the informant linking Alex Arias directly to the 444 kilogram cocaine shipment would have been highly exculpatory because it would have lent substantial credence to the defendant's trial defense in two critical respects: first, the jury would have been permitted to infer that Alex's detailed knowledge about the exact quantity of cocaine that was about to arrive in the United States indicated that Alex was no doubt a key member of the conspiracy. Second, and more importantly, Mascari, while admitting he knew Alex, and that he had, in the past, done business with him, had consistently denied in his trial testimony ever having engaged in any illicit narcotics business with Alex--especially, business relating to the 444 kilogram shipment. Figueroa's testimony directly linking Alex to the very same 444 kilogram cocaine shipment to which Mascari had admitted a direct connection, would have shown the jury that Mascari's testimony implicating Antonio, rather than Alex, as his partner in the illicit narcotics transaction was totally lacking in credibility.

As a third example, trial testimony from government agents indicated that, on July 30 and 31, 2007, when they first began searching the cargo of the Napier Star, Figueroa's information had initially caused them to focus their search mainly on banana pallets containing the "Five-a-Day" banana label.[5] It was undisputed at trial that "Five-a-Day" was the banana label, owned exclusively by Mascari, under which, for almost an entire year prior to arrival of

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[5] Only later, on the second day of the search, was it determined, based upon new information from Figueroa, that the cocaine may actually have arrived secreted in a pallet of "Anita" brand bananas.

the 444 kilogram cocaine shipment in this case, Mascari had done an extensive amount of business with Alex Arias. It would have been logical and reasonable for the jury to conclude, therefore, and the defense should have been permitted to establish at trial through the FBI informant, that the informant's original information that the pallet containing the cocaine had been shipped under the "Five-a-Day" label was information which had been derived by the informant directly from the person who, in the past, had regularly done business with Mascari under that "Five-a-Day" label—Alex Arias. While testimony from the informant identifying the person from whom he had received his information would have exculpated Antonio Arias and would have severely impeached Mascari's trial testimony, once again, the trial court's arbitrary exclusion of the informant's testimony had resulted in the complete denial of all opportunity for the defense to present the foregoing evidence to the jury.

In short, to suggest, as the Second Circuit's ruling clearly does, that an FBI agent's so-called "overlapping" trial testimony about the informant's never having mentioned Antonio Arias to the FBI could suffice as an adequate substitute for the substantial testimonial evidence the defense sought to elicit directly from the informant would be the same as saying that a concert audience, having been afforded an opportunity to listen to but a single bar of an entire Mozart symphony had, nonetheless, been afforded an adequate opportunity to enjoy and appreciate that entire symphony because hearing one bar sufficed as a substitute for hearing the entire work.

B. Even if the Defense Sought to Prove Only That Figueroa Had Never Mentioned Arias, Denying the Defense Access to the FBI Informant's Testimony Still Deprived the Defendant of an Adequate Opportunity to Present a Defense

As previously demonstrated, the defense clearly sought to elicit from, and establish through, its informant-witness a great deal more in terms of exculpatory testimony than what the Second Circuit described as an agent testifying that the informant did not "mention" the defendant while working for the FBI. But, even if it were assumed that, in seeking to offer the informant's testimony, the defense had wanted to make only that single point to the jury, the defense still should have been permitted to introduce, and the trial court's decision had wrongfully prevented, testimony directly from the informant which would have explained the significance of the agent's statement, and given it a great deal more weight and meaning. Without testimony directly from the informant about the depth of knowledge he had acquired and possessed while working for the FBI about the conspiracy's affairs, about its members, and about its inner workings, the mere assertion heard by the jury in testimony from the FBI agent that Figueroa "never mentioned Arias" had to be practically meaningless to the jury and thus entirely unhelpful to the defense. Based upon their verdict, the jurors, upon hearing such scant testimony from the agent, had most likely concluded that the informant's mere failure to "mention" Antonio Arias to the FBI did not necessarily mean that Mascari's testimony about the

defendant's involvement in the conspiracy was not credible. The jury could have concluded, for example, that, while the informant had not actually "mentioned" Antonio Arias to the FBI, such failure was probably attributable to the fact that the informant simply did not know Antonio Arias by name, and that, in all likelihood, the informant would have been able to identify Antonio Arias by sight. Alternatively, the jury could have believed, based upon the mere testimony of the agent, that the informant perhaps knew the defendant by another name, or by a nickname. Clearly, the defense was entitled to an opportunity to use the informant's testimony to resolve in the minds of the jury all reasonable doubts in favor of the defendant. Thus, contrary to the Second Circuit's conclusion, the agent's mere assertion that his informant (Figueroa) had never mentioned Arias, standing alone, does not suffice as a fair and adequate substitute for the direct testimony of the informant himself on the subject of Antonio Arias's membership in the conspiracy.[6] Indeed, allowing the testimony of the agent to stand unsupported may very well have been detrimental to the defense case rather than, as the Second Circuit's ruling has suggested, helpful.

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[6] This, of course, is not to say that both the district court and the court of appeals should not have viewed the testimony of the agent that Figueroa never mentioned Arias as a clear *indicator* of just how extremely valuable Figueroa's testimony regarding Antonio Arias's membership in the conspiracy would likely have been to the defense had the district judge properly scrutinized Figueroa's assertion of the privilege and compelled his non-privileged testimony. Figueroa's never having heard the name Antonio Arias, while clearly knowing Alex, was a clear indicator of Figueroa's ability to exculpate Antonio Arias.

Finally, in making its "harmless error" determination, the Second Circuit completely ignored the fact that the jury in the first trial of this case had actually deadlocked on the issue of Mr. Arias's guilt or innocence. It has been held that a hung jury in a previous trial "suggests that the case was close." *Zappulla v. New York*, 391 F.3d 462, 471 (2d Cir. 2004); citing *Kyles v. Whitley*, 514 U.S. 419, 454 (1995). Given that this was a close case, it cannot be said that the trial court's arbitrary and erroneous exclusion of the non-privileged testimony sought to be introduced by the defense through the FBI informant was harmless. Since, as argued, the district court's error in this case resulted in the unwarranted exclusion of non-privileged testimony which would not only have called into question the credibility of the government's one and only trial witness against the defendant, but would also have supported the defendant's third-party culpability defense, under well-established precedent of this Court, the erroneous exclusion of Figueroa's non-privileged testimony cannot reasonably be considered harmless beyond a reasonable doubt. The Second Circuit's conclusion to the contrary appears to be in direct conflict with prior decisions of this Court. Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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2011 WL 48550

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ANTONIO MIGUEL ARIAS,
also known as Gilberto Miranda,
also known as Miguel,
Defendant-Appellant.

No. 09-5191-cr.

Jan. 7, 2011.

Appeal from the United States District Court for the District of Connecticut (Thompson, J.)

Gary A. Mastronardi, Bridgeport, CT, for Appellant.

H. Gordon Hall and Sandra S. Glover (on the brief), Assistant United States Attorneys, for David B. Fein, United States Attorney, District of Connecticut, Appellee.

Present: AMALYA L. KEARSE, JOHN M. WALKER, JR., ROSEMARY S. POOLER, Circuit Judges.

SUMMARY ORDER

*1 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and hereby is AFFIRMED.

Antonio Miguel Arias appeals from convictions of conspiracy, and attempt, to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(ii). Arias was sentenced principally to 30 years in prison, with 10 years of supervised release. Arias's convictions arise from a scheme to import cocaine from Colombia in shipments of bananas. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal.

First, Arias argues that the district court clearly erred by admitting certain out-of-court statements presented at trial as coconspirator statements within the scope of Federal Rule of Evidence 801(d)(2)(E).

We review for clear error a district court's findings regarding "whether there was a conspiracy involving the declarant and the nonoffering party, and whether the statement was made during the course and in furtherance of the conspiracy." *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 137 (2nd Cir. 2008) (brackets and internal quotation marks omitted).

Having reviewed the record in light of the controlling substantive principles, we find that the district court did not clearly err in finding that the declarant's statements and independent corroborating evidence showed that the declarant was a member of the conspiracy, *see Bourjaily v. United States,* 483 U.S. 171, 181, 107 S. Ct. 2775, 97 L.Ed.2d 144 (1987), and that the statements were made to "provid[e] reassurance to a coconspirator ... or inform [ ] coconspirators as to the progress or status of the conspiracy," *United States v. Tracy,* 12 F.3d 1186, 1196 (2d Cir.1993).

Second, Arias argues that the district court violated his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor when the district court denied his motion to compel the testimony of an alleged FBI confidential informant.

Arias's defense at trial was that his brother Alex, not he, was involved in the cocaine conspiracy. Arias relied on Government-disclosed FBI reports by an alleged FBI confidential informant ("CI"), dated July and August 2007, that did not mention (Antonio) Arias but stated that Alex Arias, his brother, was a member of the conspiracy. The Government refused to disclose further information about the CI.

Before trial, Antonio Arias subpoenaed the CI. Arias wanted to show that the CI "was so well placed [in the conspiracy] that if [Antonio] Miguel Arias was involved in that conspiracy, [the CI] would certainly have known about it." Expecting that the CI would invoke the Fifth Amendment privilege against

compulsory self-incrimination, Arias requested an evidentiary hearing at which the district court would "determine ... whether or not [the CI] has a privilege in the first place." Arias stated that he would ask only about "information which had been obtained and provided by [the CI] under the supervision of the government and during the course of his cooperation."

*2 The district court denied Arias's motion. It did so without holding a hearing at which Arias could ask the CI questions and the district court could determine which, if any, of the questions the CI had a privilege not to answer. The court stated that:

> Delving into whether [the CI] was so "well-placed" in the cocaine conspiracy that he would necessarily have had information regarding defendant Arias's involvement would require [the CI] to respond to a wide array of questions concerning activities, undoubtedly including illegal activities, in which he engaged that could have resulted in him being "well-placed," or not.

Given "the implications of the questioning to which he would be subjected on both direct examination by defendant Arias and cross-examination by the government," the district court said it was "easy to see ... that responsive answers could furnish a link in the chain of evidence needed to prosecute [the CI] for a federal crime."

The Government argues that the CI's Fifth Amendment right supersedes Arias's Sixth Amendment right, and thus the district court correctly prevented Arias from compelling the CI to

testify. Arias, by contrast, argues that the district court did not undertake a particularized inquiry to determine whether the CI's Fifth Amendment assertion was founded on a reasonable fear of prosecution as to the "specific areas of inquiry sought to be covered in questioning [the CI]."

Although a valid Fifth Amendment claim "provide[s] a justification for compromising an accused's Sixth Amendment rights," *United States v. Rodriguez,* 706 F.2d 31, 36 (2d Cir.1983), "only questions which might elicit incriminatory answers are barred by a proper [F]ifth [A]mendment claim," *United States v. Bowe,* 698 F.2d 560, 566 (2d Cir.1983). "[A] blanket assertion" of a Fifth Amendment privilege is insufficient. *Id.* Rather, the district court must "undertake a particularized inquiry to determine whether the [Fifth Amendment] assertion was founded on a reasonable fear of prosecution as to each of the posed questions." *United States v. Zappola,* 646 F.2d 48, 53 (2d Cir.1981); *Rodriguez,* 706 F.2d at 37 ("[O]nce a witness has claimed [a Fifth Amendment] privilege, the district court must determine whether that claim is valid in relation to the subject area about which inquiry is sought."). Indeed, "Fifth Amendment privilege claims should be closely scrutinized because allowing a witness not to testify compromises the Sixth Amendment right of an accused 'to have compulsory process for obtaining witnesses in his favor.' " *United States v. Lumpkin,* 192 F.3d 280, 285 (2d Cir.1999) (quoting *Washington v. Texas,* 388 U.S. 14, 17, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Here, Arias sought to ask about the following:

> I'm going to be asking him questions about [1] what he did under FBI supervision in cooperation with the FBI; [2] the things that he reported to the FBI; [3] the things that he knew about [ ] the conspiracy that he reported to the FBI. And I'm going to be asking him that to show how well placed he is in the conspiracy and how much, you know-how he was in a position that was of trust with this conspiracy. And then, once I've satisfied that, once I've accomplished that, then the next question is: [4] Did you ever hear about Antonio Arias?

*3 In addition, Arias stated that:

> [T]he questions that I would address to [the CI] do not have to do with any criminal activity he might have dome before he started assisting the FBI or after he stopped assisting the FBI. I intend to ask him questions only relating to the period of time within which he was assisting the FBI. And the critical period would be from the beginning of the alleged conspiracy in this case, would be around February or March of '07 through July or into August of '07, about halfway through August of '07.

Arias argues that the district court failed to determine whether the CI had "a reasonable fear of prosecution," *Zappola,* 646 F.2d at 53, as to any or all of the above four questions. First, Arias argues that the district court did not determine whether, as Arias alleged, the CI had immunity for certain activities or during a certain time frame as a result

of the CI's cooperation with the FBI. Further, Arias argues that the district court, having denied Arias's request for a hearing with the CI to determine the CI's Fifth Amendment claims, misapprehended the scope of questioning by Arias. The court stated that Arias would ask "a wide array of questions concerning activities, undoubtedly including illegal activities, in which [the CI] engaged that could have resulted in him being 'well-placed.' " Arias had stated that he would limit his inquiry to four areas of questions, although he proposed to begin his inquiry in "February or March of '07," before the date of the first Government-disclosed FBI report of cooperation by the CI.

We do not decide whether the district court erred by failing to "closely scrutinize" the CI's privilege claim, *Lumpkin,* 192 F.3d at 285, thus "compromis[ing] an accused's Sixth Amendment rights," *see Rodriguez,* 706 F.2d at 36. Nor do we decide whether the district court erred by upholding the CI's Fifth Amendment privilege not to answer Arias's questions based on "the implications of the question[s]" that the CI might have received on "cross-examination by the government."

On the facts of this case, we find that if the district court erred, the error was harmless. A reviewing court may disregard constitutional error if it is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 305 (1967). In this case, the cocaine importer testified that he had met Antonio Arias, agreed to Arias's plan to import cocaine in pallets of bananas, and then

imported hundreds of kilograms of cocaine, which Antonio Arias received. Further, at trial Arias questioned an FBI Special Agent who dealt with the CI, and the Special Agent testified that the CI never mentioned Antonio Arias. Because the Special Agent's testimony substantially overlapped with the questions Arias wanted to ask the CI, and the jury actually rested its verdict on the first-hand testimony of the cocaine importer, "the guilty verdict actually rendered in this trial was surely unattributable to the [alleged] error." Sullivan v. Lousiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis omitted).

*4 We have considered Arias's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

v.

ANTONIO MIGUEL ARIAS.

CASE NO. 3:07CR00299 (AWT)

ORDER RE DEFENDANT ARIAS'S SECOND MOTION FOR ORDER COMPELLING TESTIMONY OF HUGO FIGUEROA

Defendant Arias's Second Motion for Order Compelling Testimony of Hugo Figueroa and for Evidentiary Hearing (Doc. No. 247), pursuant to which defendant Arias sought an order compelling Hugo Figueroa "to provide testimony in this case and to respond to all questions addressed to him by defendant" was DENIED. (Mot. to Compel Test. at 1.) For the reasons set forth below, the questions that defendant Arias wishes to put to Figueroa are ones to which Figueroa could properly assert his Fifth Amendment privilege against self-incrimination; in addition, it is clear that Figueroa would do so.

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951). Furthermore, "the privilege extends not only to those disclosures that in and of themselves would support a conviction, but also to those that might 'furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.'" *U.S. v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999) (quoting *Hoffman,* 341 U.S. at 486). The court's analysis should take into consideration not only responsive answers to questions sought to be

asked on direct examination but also the fact that the witness would be required to give responsive answers on cross examination. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 259-60 (1983) ("But even if the direct examination is limited to the questions and answers in the immunized transcript, there remains the right of cross examination . . . ."); *United States v. Rodriguez*, 706 F.2d 31, 37 (2d Cir. 1983) ("However, her likely testimony with respect to the transactions herein would necessarily have exposed her to examination, on cross if not direct, relating to her purpose in seeking to obtain a passport in another person's name, which in turn would likely have led to inquiry regarding her entrepeneurial [sic] role in prostitution activities . . . .").

Defendant Arias contends that Figueroa was so well-placed in the cocaine conspiracy charged in this case that he was in a position to report on the activity of the high-ranking persons in the conspiracy and that because he never mentioned defendant Arias to the FBI, a reasonable inference is that the defendant was not involved in the cocaine conspiracy charged in this case. Delving into whether Figueroa was so "well-placed" in the cocaine conspiracy that he would necessarily have had information regarding defendant Arias's involvement would require Figueroa to respond to a wide array of questions concerning activities, undoubtedly including illegal activities, in which he engaged that could have resulted in him being "well-placed", or not. It is easy to see from the implications of the questioning to which he would be subjected on both direct examination by defendant Arias and cross-examination by the government that responsive

answers could furnish a link in the chain of evidence needed to prosecute Figueroa for a federal crime. Figueroa would be forced to review ground he had already covered in any statements to the government, which could expose him to prosecution for perjury. See Pillsbury, 459 U.S. 248. In addition, he would be forced to cover any ground he had not previously covered with the government, which could expose him to prosecution for offenses about which the government has no information. Although defendant Arias suggests at one point in his motion that the information sought to be elicited from Figueroa would only be information obtained and provided by Figueroa under the supervision of the government, it is apparent from the documents submitted to the court that if Figueroa was ever "well-placed," he did not become so under the supervision of the government.

Figueroa was required to appear for a hearing on May 20, 2009 and asserted his Fifth Amendment privilege against self-incrimination. The information that defendant Arias seeks to elicit from Figueroa is, in substance, the same information sought to be elicited from Figueroa at the May 20th hearing. Counsel for Figueroa represents that Figueroa will once again assert his Fifth Amendment privilege, and the court credits that representation.

Finally, the court notes that this is not a situation where the government has any obligation to grant use immunity to a witness the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment if not immunized. (*See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006);

United States v. Dolah, 245 F.3d 98, 105 n.5 (2d Cir. 2001); *United States v. Diaz*, 176 F.3d 52, 115 (2d Cir. 1999)).

It is so ordered.

Signed this 26th day of June, 2009 at Hartford, Connecticut.

/s/AWT

Alvin W. Thompson

United States District Judge